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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
1998 Biennial Regulatory Review --	)	
Reform of the International Settlements	)	IB Docket No. 98-148
Policy and Associated Filing Requirements	)	
	)	CC Docket No. 90-337
Regulation of International	)	
Accounting Rates	)	

MOTION FOR LEAVE TO FILE LATE-FILED COMMENTS

PrimeTEC International, Inc. ("PrimeTEC"), by its attorneys, hereby moves for leave to file the attached late-filed comments in the above-captioned proceeding.

In support of its motion, PrimeTEC submits (1) that it attempted to deliver its comments at the Commission at 5:31 p.m. on September 16, 1998; (2) acceptance of the comments will not prejudice any party to this proceeding because the comments are being filed in the Commission Secretary's Office by 9:15 a.m. on September 17, 1998, will be hand-delivered to International Transcription Services, and an electronic copy of the comments was delivered to the International Bureau for web posting on September 17th; and (3) that this is a Notice and Comment proceeding for which an eighteen hour filing delay will not materially affect any party's rights.

WHEREFORE, good cause having been shown, PrimeTEC asks that the Commission grant the relief requested.

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Respectfully submitted.

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COMMENTS OF PRIMETEC INTERNATIONAL, INC.

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September 16, 1998

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COMMENTS OF PRIMETEC INTERNATIONAL, INC.

I. INTRODUCTION AND SUMMARY

PrimeTEC International, Inc. ("PrimeTEC"), by its attorneys, files these comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1] PrimeTEC is a competitive provider of international facilities-based and resale telecommunications service.

PrimeTEC agrees wholeheartedly with the NPRM that aspects of the ISP (such as uniform rates on parallel routes, proportionate return of inbound traffic and certain reporting requirements) impede competition, and should be repealed. However, as the NPRM also notes, reform must proceed carefully to avoid anti-competitive behavior by large correspondents who exercise market power. Id. at ¶15.

[1] In the Matter of 1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements, Regulation of International Accounting Rates,

(footnote continued to next page)

As it reforms the ISP and related filing requirements, the Commission at a minimum should be particularly mindful about making more than minor changes to important safeguards such as the first Flexibility Order safeguard and the "No Special Concessions" rule. Large-scale changes would disserve competition and frustrate the Commission's goal of giving consumers the benefits of open, competitive markets on international routes.

Furthermore, as the Justice Department has recommended,[2] and the Commission has determined in related proceedings,[3] the Commission should consider all affiliate relationships including non-equity joint ventures as analogous to formal affiliations for purposes of competitive safeguards it adopts in this proceeding.

Commission policies permitting small carriers to compete in the long distance market have clearly proved essential to lowering domestic long distance rates. Similarly, international calling rates will not approach cost-based levels unless Commission policies *not only* aim to reduce inflated settlement rates, *but also* create conditions under which smaller carriers may engage in vigorous price competition with communications giants. Consumers would derive far fewer benefits if the Commission reforms help to reduce overall flows of settlement payments abroad, but pave the way for domination of international routes by a small club of oligopolists. Stated differently, reforming the ISP without implementing safeguards -- adopted in the

(footnote continued from previous page)
Notice of Proposed Rulemaking, IB Dkt. No. 98-148, CC Dkt. No. 90-337 (rel. Aug. 6, 1998) (hereafter "the NPRM").

[2] Foreign Carrier Entry Order, 11 FCC Rcd. 3873, 3969 at ¶252 (1995).

[3] See, e.g., id. at ¶253; Flexibility Order, 11 FCC Rcd. 20,063, 20,082-83 at ¶48 (1996).

Flexibility Order -- to prevent carriers who control more than 25% of traffic on international routes from engaging in anti-competitive behavior would defeat the goals of the WTO Agreement as newer entrants abroad (and in the United States) found themselves priced out of the market.

II. THE COMMISSION SHOULD RETAIN IMPORTANT SAFEGUARDS THAT HELP TO CREATE THE CONDITIONS UNDER WHICH VIGOROUS COMPETITION IS DEVELOPING.

A. The NPRM's Proposed Reforms to the ISP with Regard to Non-Dominant Carriers Should Be Subject to Safeguards Limiting and Permitting Adequate Oversight of Potentially Anti-Competitive Arrangements.

PrimeTEC generally supports the NPRM's proposal (at ¶18-20) to allow alternative settlement arrangements with foreign carriers in WTO countries. However, at a minimum, PrimeTEC urges the Commission to protect against anti-competitive conduct of large foreign and U.S. carriers by retaining and applying the first Flexibility Order safeguard (discussed at greater length in the next subsection) with respect to arrangements affecting 25% or more of inbound or outbound traffic on a particular route.[4] Filing requirements coupled with effective prohibitions against unreasonably discriminatory arrangements between carriers that pose a risk to competition remain essential if Commission policy is to promote full competition.

The Flexibility Order found that allowing alternative settlement arrangements created a significant risk of "anti-competitive actions by foreign *and* U.S. carriers with a significant share

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[4] 11 FCC Rcd. 20,063, 20,081-82 at ¶¶44-47 (1996).

of their markets."[5] It further determined that the 25% market share safeguard was valuable "to provide a 'safety net' for possible unanticipated consequences," such as "dramatic and sudden shifts in return traffic away from a U.S. carrier."[6] This rationale applies with equal force today to arrangements entered into by large U.S. carriers in newly competitive markets. The Commission also specifically found that the "twenty-five percent threshold affords carriers considerable discretion in negotiating alternative arrangements and is high enough to provide carriers the incentive to negotiate alternative arrangements." Id. at 20,082 at ¶46. This rationale is equally applicable today, especially if the FCC relaxes or repeals other safeguards.

In determining market share, the Commission should, of course, examine all agreements between carriers affecting the route in question.[7] It should likewise aggregate traffic of affiliates and non-equity joint venture partners in light of the Commission's previous finding, supported by the Justice Department, that non-equity joint ventures "create a risk of anti-competitive conduct that requires regulatory scrutiny."[8]

1. Arrangements with Foreign Carriers Who Lack Market Power

In response to the NPRM's question (at ¶20), ordinarily, foreign carriers that lack market power do not have the ability to engage in whipsawing. The 50% market share line is not the only criterion to which the Commission should look in determining whether there is a risk of

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[5] 11 FCC Rcd. at 20,081, ¶45 (emphasis added).

[6] Id. at ¶¶45, 44.

[7] Flexibility Order, 11 FCC Rcd. at 20,082, ¶47

whipsawing. For example, a firm's control of a dominant share of capacity on a route would plainly give it the ability to whipsaw other carriers even if it did not control 50% of the retail market.[9]

However, the Commission should not enshrine preventing whipsawing of U.S. carriers as the sole purpose of its competitive safeguards. As the Commission determined in the Flexibility Order, carriers with market share of 25% or more on a route have the potential to disrupt significantly the ability of smaller competitors to do business on that route.[10] Such anti-competitive behavior can be perpetrated by both foreign carriers *and* by very large U.S. carriers, who may disrupt, and extract huge concessions from, fledgling foreign and U.S. competitors. Indeed, although whipsawing is traditionally viewed as an activity of foreign carriers who play one U.S. carrier against another to leverage the most advantageous settlement arrangement, it is equally true that a U.S. carrier with very large market share can engage in similar conduct in its dealings with fledgling foreign carriers. In all of these circumstances, such anti-competitive conduct harms U.S. consumers and damages the development of competition in foreign markets, the long-standing and principal goal of Commission policy in this area.

In foreign markets in which no carrier controls 50% or more of the traffic (either alone or together with its affiliates and non-equity joint venture partners), the Commission should allow

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[8] Foreign Carrier Entry Order, 11 FCC Rcd. at 3969, ¶¶252-53.

[9] See, e.g., Foreign Participation Order, 12 FCC Rcd. at 23,959, ¶161.

[10] 11 FCC Rcd. at 20,081, ¶44.

alternative settlement arrangements. However, as the NPRM itself notes, its tentative conclusion with regard to such traffic "would essentially eliminate regulatory oversight" for such arrangements. Id. at ¶24. Because of the risk of anti-competitive behavior by larger foreign and U.S. carriers, these alternative settlement arrangements should be subject to the Flexibility Order safeguards governing arrangements that affect 25% or more of the traffic on the route in question.

2. Arrangements with Foreign Carriers In Liberalized Markets Who Possess Market Power

The NPRM also proposes to lift the ISP for U.S. carrier arrangements with foreign carriers who possess market power in markets that offer equivalent resale opportunities or where 50% of traffic on the route is settled at or below the Commission's benchmark rate. Id. at ¶¶25-27.

In light of the greater danger of whipsawing by dominant carriers, the Commission should permit such arrangements only where traffic meets the Commission's benchmark and the foreign market permits U.S. carriers to provide service via ISR. See NPRM at ¶29. Furthermore, in this context, both Flexibility Order safeguards are necessary to ensure adequate oversight of potentially anti-competitive arrangements between dominant foreign carriers and their affiliates or very large U.S. carriers. See NPRM at ¶30.

B. The Commission Should Retain the First *Flexibility Order* Safeguard.

As stated above, PrimeTEC agrees strongly with the NPRM's tentative conclusion that the Flexibility Order safeguard for arrangements affecting 25% or more of traffic on a route[11] should be left undisturbed. Id. at ¶34. The safeguard plays a valuable role in limiting abuses and creating transparencies of alternative arrangements that pose the greatest risk of anti-competitive behavior. Arrangements between carriers who control 25% or more of inbound or outbound traffic on a route can have major adverse effects on competitors and on consumers, regardless of whether the traffic is outbound or inbound.

The NPRM's tentative conclusion that Section 43.51 filing obligations generally should be relaxed for settlement arrangements affecting less than 25% of the inbound or outbound traffic on a route, id. at ¶33, is also well-founded. Where there are multiple facilities-based providers capable of terminating the traffic in the foreign country in question, and the parties to the agreement are not affiliated or involved in a non-equity joint venture, such arrangements present a minimal risk of anti-competitive behavior.

The NPRM also states that "there is little danger" that arrangements with affiliated carriers will have anti-competitive effects if the foreign affiliate lacks market power in the foreign market. Id. at ¶34. While this is true as a general matter, the *combined* market share of the U.S. carrier and its foreign affiliate or joint venture partner may exceed 25% of the traffic on a route, and therefore should trigger the protections of the first safeguard. However, absent such an arrangement, a certification filing rule is entirely appropriate.

[11] 11 FCC Rcd. at 20,081-82. ¶¶44-47 (1996).

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C. The Commission Should Retain the No Special Concessions Rule to the Greatest Extent Practicable.

The "No Special Concessions" rule[12] is critical to preserving smaller carriers' ability to interconnect and compete in the international marketplace. Without it, dominant foreign carriers could engage in a host of discriminatory actions with respect to price, interconnection, quality of service, etc., in favor of their own affiliates, joint venture partners, and larger U.S. carriers who handle greater traffic volumes.

The NPRM (at ¶40) seeks comment on how to apply the "No Special Concessions" rule if the Commission declines to apply the ISP on ISR routes. Should the Commission decide to eliminate or alter the ISP on these routes, it should nonetheless retain the rule to the greatest extent practicable.

First, all of the factors other than price set forth in § 63.14(a) are critical to U.S. carriers' ability to do business in a foreign market, even where ISR is available. Regardless of what price traffic is settled for, U.S. consumers are ill-served by exclusive arrangements that shut out or hobble most competitors from the U.S. Indeed, such arrangements are antithetical to Commission policy with respect to common carriers, and at odds with Section 201's prohibition against "unjust or unreasonable" practices. See 47 U.S.C. § 201(b). Accordingly, if the Commission adopts its tentative conclusion that the No Special Concessions rule does not apply on ISR routes to deviations from the ISP with respect to price and allocation of return traffic, see NPRM at ¶ 41, it must retain the other aspects of the rule

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[12] 47 C.F.R. § 63.14(a).

Second, as PBCom and NYNEX explain in their petitions for reconsideration, exclusive arrangements between foreign and U.S. carriers affecting 25% or more of inbound or outbound traffic on a route impede, rather than promote, competition.[13] Such arrangements should not only be subject to full disclosure, but should also be treated as a prohibited Special Concession under § 63.14 or as unreasonable discrimination under the first Flexibility Order safeguard.

Finally, with regard to the NPRM's questions regarding "groomed" traffic (at ¶ 43), PrimeTEC believes that where either carrier exercises market power in a market in which the traffic either originates or terminates, the arrangement would raise significant competitive concerns if it is exclusive. In such circumstances the terms available, for example, to the incumbent LEC should also be available to competitors seeking to originate and terminate traffic in the same location.

D. The Commission Should Permit Greater Use of ISR.

The Commission's ISR rules have proven an effective means of lowering international rates paid by U.S. consumers and of circumventing inflated settlement rates. From PrimeTEC's observation operating in the British market, Britain's broader ISR rules have been an even greater success in this regard. ISR also benefits consumers by affording the least expensive avenue for smaller competitors to enter new markets.

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[13] PB Com Petition for Reconsideration, CC Dkt. 90-337, at 3-5; NYNEX Petition for Reconsideration, CC Dkt. 90-337, at 3-8.

The Commission's outright ban on ISR on routes that fail to meet the criteria set forth in the Foreign Participation Order,[14] while directed at an important policy goal, is a blunt instrument that prohibits considerably more arrangements than necessary to achieve its goal. PrimeTEC concurs with the NPRM's observation (at ¶38) that allowing limited amounts of ISR on a route would place significant downward pressure on settlement rates. Accordingly, the Commission should allow ISR for arrangements between carriers that control less than 5% of traffic on a particular route to a WTO country. Such a rule would have a minimal effect on the U.S. balance of trade, while improving rates for consumers and putting pressure on inflated settlement rates.

The NPRM (at ¶17) seeks comment on its tentative conclusion that it not apply any of the reforms proposed in the notice to non-WTO countries PrimeTEC suggests that the Commission allow ISR affecting a small percentage of traffic on routes to such countries on an experimental basis to assess its impact on settlement rates. The Commission could revisit and adjust both these revisions to the ISR rules as warranted.

III. CONCLUSION

For the foregoing reasons, PrimeTEC asks the Commission to: (1) retain the Flexibility Order safeguard governing arrangements that affect 25% or more of inbound or outbound traffic on a particular route; (2) aggregate a carrier's market share with that of all affiliates and non-equity joint venture partners for purposes of determining whether the carrier controls 50% of a foreign market or 25% or more of the inbound or outbound traffic on a route; (3) retain the No

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[14] 12 FCC Rcd. 23,891, 23,930-31 at ¶85 (1997).

Special Concessions rule for all terms other than settlement terms; (4) liberalize use of ISR to WTO and non-WTO countries by carriers who control less than 5% of the traffic on a particular route; and (5) grant NYNEX's and PB Com's petitions

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